



## ARGUMENT

### Legal Standard

To intervene by right under Rule 24(a) of the Rules of Civil Procedure, an intervenor must (1) make a timely motion to intervene, (2) show an interest in the subject matter of the lawsuit, (3) show that its interest would be impaired by the lawsuit, and (4) show that its interest is not adequately represented by existing parties. *See* Fed. R. Civ. P. 24(a); *Stuart v. Huff*, 706 F.3d 345 at 349 (4th Cir. 2013) (citing *Teague v. Bakker*, 931 F.2d 259, 260-61 (4th Cir. 1991)).

#### **I. Proposed Intervenors Cannot Demonstrate A Right to Intervene.**

Proposed intervenors cannot demonstrate that their interests will be impaired or not adequately represented by the State Board. Contrary to the suggestion in the Memorandum of Law supporting the Motion to Intervene [D.E. 16, pp. 6-10], the State Board adequately represents the interests of *all* North Carolina voters—including Proposed Intervenors' members—in ensuring that eligible North Carolina voters are able to register to vote, remain registered to vote, and are afforded the opportunity to cast a ballot. Implicit in the authority of the State Board is the authority to protect the interests of all North Carolina voters. The State Board stands ready to protect those interests to ensure that eligible voters are not disenfranchised.

Proposed Intervenors claim their interests may be impaired because this Court may grant the requested relief that itself violates the NVRA. *Id.*, pp. 6-7. This argument requires this Court to agree that it will issue an order in violation of the NVRA.

Proposed Intervenors further argue that intervention is required because Plaintiffs

claim to seek reasonable list maintenance efforts, but fail to point to any specific voters that should be removed or on what grounds they should be removed. *Id.*, p. 7. This argument has already been made in the State Board’s motion to dismiss. [D.E. 20, pp. 11-13, 20-25]. Thus, Proposed Intervenors have failed to adequately establish that their interests will be impaired absent intervention because the State Board is more than capable of representing those interests, and is already doing so.

Proposed Intervenors also claim that they have a unique interest in invoking the NVRA “as a shield to protect registrants from . . . error-prone voter purges.” [DE 16 at 9]. Again, the State Board is already obligated to protect against erroneous voter purges. Among the responsibilities of the State Board is the duty to implement the NVRA by overseeing the State’s voter registration and voter list maintenance. *See, e.g.* N.C.G.S. § 163-82.10. The State Board implements a “uniform program” of voter list maintenance, which ensures that any maintenance is “nondiscriminatory” and “compl[ies] with the provisions of the Voting Rights Act of 1965, as amended, and with the provisions of the [NVRA].” N.C.G.S. § 163-82.14. The State Board also provides guidance to county boards of elections on proper list maintenance activities, which are designed in part to protect eligible voters from being removed from the voter rolls. *E.g.*, N.C. State Bd. of Elections, *Maintaining the Voter Registration Database in North Carolina* (July 27, 2017) (attached as Exhibit A to the motion to dismiss [D.E. 21-1]) In addition, the State Board builds in protections to ensure that eligible voters are not removed from the State’s voter registration database by mistake or due to inaccurate data. *See, e.g., id.*; N.C. State Bd. of

Elections, Post-Election Audit Report 1 (Apr. 21, 2017).<sup>1</sup>

Moreover, the State Board has already demonstrated its ability to defend against parties who seek to use the NVRA to challenge list maintenance procedures. In a recent case in which the plaintiff brought a similar claim against the State Board, the Board defended the interests of eligible voters and espoused the chief goal of the NVRA to enhance voter registration in the agency's interpretation of the statute. *E.g.*, Brief of Defendants-Appellees at 33–38, *Pub. Interest Legal Found. v. N.C. State Bd. of Elections*, No. 19-2265 (4th Cir.). More recently, the State Board obtained a recommended dismissal from a Magistrate's Memorandum and Recommendation in which the Court found that the Plaintiff's complaint alleging violations of the NVRA should be dismissed on multiple grounds. *Judicial Watch v. State, et al.*, No. 3:20-cv-211, Dkt. No. 61 (W.D.N.C. Aug. 20, 2021). That recommended ruling is currently subject to review by the District Judge assigned to that matter. *Id.* In that same ruling, the same Proposed Intervenors sought intervention and the Magistrate Judge recommended denial of their motion because he found that the State Board's motion for dismissal should be granted. *Id.*, pp. 20-21.

Similarly, in this matter, the State Board has already filed a motion to dismiss the complaint arguing that Plaintiff's allegations are insufficient to establish standing or state a claim upon which relief can be granted. [D.E. 20]

Finally, contrary to Proposed Intervenors claim, the State Board remains fully

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<sup>1</sup> Available at [https://s3.amazonaws.com/dl.ncsbe.gov/sboe/Post-Election%20Audit%20Report\\_2016%20General%20Election/Post-Election\\_Audit\\_Report.pdf](https://s3.amazonaws.com/dl.ncsbe.gov/sboe/Post-Election%20Audit%20Report_2016%20General%20Election/Post-Election_Audit_Report.pdf).

capable of adequately defending the interests of North Carolina voters despite the COVID-19 pandemic. While it is true that the COVID-19 pandemic has placed burdens on the State Board and county boards, just as it has placed burdens on all of us, [D.E. 16 at 2, 3, 4, & 10], the State Board has defended, and continues to adequately defend, against Plaintiff's claims and to uphold the interests of eligible North Carolina voters. The State Board is represented by the Attorney General, with whom North Carolina law entrusts the defense of the State and its agencies. *See N.C. State Conf. of NAACP v. Cooper*, 332 F.R.D. 161, 169 (M.D.N.C. 2019) (citing N.C.G.S. § 114-2(1)); *see also Martin v. Thornburg*, 320 N.C. 533, 546 (1987) (“[T]he duties of the Attorney General in North Carolina as prescribed by statutory and common law include the duty to appear for and to defend the State or its agencies in all actions in which the State may be a party or interested.”); and *Fisher-Borne v. Smith*, 14 F.Supp.3d 699, 704 (M.D.N.C. 2014) (setting out the Attorney General's duties). An unfounded assertion that the State Board may not have the ability or incentive to defend its own actions does not demonstrate inadequacy of representation for intervention as of right. *See Cooper*, 332 F.R.D. at 171.

The Fourth Circuit's decision in *Teague v. Bakker*, 931 F.2d 259 (4th Cir. 1991) (cited at [D.E. 16 at 8]), addresses a different scenario altogether. In *Teague*, a group of class-action plaintiffs, who had obtained a multimillion-dollar judgment against the defendants in a separate case, sought intervention as of right in an insurance coverage dispute, the outcome of which could determine whether the intervenors' judgment would ever be paid. *Id.* at 260. The defendants were either in prison or of “modest means,” so it was beyond dispute that their ability to defend the litigation was compromised. *Id.* at

262. No such financial constraints will prevent the North Carolina Department of Justice from adequately defending the State Board in this case.

Thus, the State Board adequately represents the interests of all North Carolina voters, including Proposed Intervenors' members, such that Proposed Intervenors have not carried their burden in proving otherwise.

### **CONCLUSION**

For the foregoing reasons, the State Board respectfully requests that this Court deny Proposed Intervenors' motion to intervene as of right. However, the State Board takes no position on the motion to the extent it seeks permissive intervention, and defers to the Court's determination on that issue.

Respectfully submitted this the 20th day of December, 2021.

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